Mahmood bin Hj Hashim v Perbadanan Islam Johor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01–267–06 OF 2012
MOHD HISHAMUDIN, AZIAH ALI AND LIM YEE LAN JJCA
13 JANUARY 2015

Companies and Corporations — Directors — Fiduciary duties — Director cum general manager proposed to company's board that company enter into commercial joint venture with another party and incorporate joint venture entity — Director did not disclose fact he was already director of joint venture entity and signatory of its cheques — Without board's approval director disbursed substantial amount to joint venture entity from where funds were withdrawn — Director failed to heed company's instruction to recover monies paid out to entity — Whether director negligent and breached fiduciary duties owed to company causing it loss

During the appellant's tenure as general manager ('GM') cum director of the respondent ('PIJ'), he proposed to its board of directors ('the board') that PIJ enter into a commercial joint venture ('the JV') with a company named Yasunaga. The majority of the board agreed to the proposal and authorised the appellant to implement it. When the JV agreement was signed on PIJ's behalf by the appellant, it provided, inter alia, that a company called Megamerge would undertake the JV, that the appellant and one of PIJ's deputy GMs would represent PIJ on Megamerge's Board of Directors and that the appellant and one Wong Kim Keong ('Wong') would be the signatories of Megamerge's cheques. At the time, the appellant did not disclose to PIJ's board that Megamerge was already incorporated two months before the JV agreement was signed and that he was one of its directors. Following that incorporation, Megamerge's board had authorised the appellant to operate its bank account jointly with Wong. On the date the JV agreement was signed, the appellant issued a cheque for RM500,000 from PIJ in favour of Megamerge without obtaining PIJ's board's approval. On discovering this fact, PIJ directed that all actions concerning the JV be stopped pending a due diligence exercise and the appellant was instructed to recover the RM500,000 and freeze Megamerge's account. He failed to heed the instruction. The appellant subsequently retired from service with PIJ and because he could no longer represent PIJ on Megamerge's board, PIJ notified Megamerge to remove him as a signatory of its bank account. The appellant, however, only resigned from Megamerge's board six months after he had left PIJ and it was alleged that between those two dates a total of RM270,000 had been withdrawn from Megamerge's account in three instalments. PIJ sued the appellant for recovery of the RM500,000 which was paid to Megamerge on the ground he had been negligent and had breached the fiduciary duty he owed PIJ when he was GM. PIJ claimed the withdrawals

from Megamerge's account could only have been possible if the appellant had co-signed the cheques. The instant appeal was against the High Court's decision favouring PIJ. The court found the appellant's defence to be a bare denial; that he had acted recklessly and without regard for PIJ's interest when he issued the RM500,000 cheque to Megamerge even before the JV agreement was signed and also in signing the JV agreement without getting the approval of PIJ's full board. The court also found the appellant had breached s 8 of the Johore Islamic Corporation Enactment 1 of 1976 ('the Enactment'), under which PIJ was established, as well as s 132 of the Companies Act 1965 because even before the JV agreement was signed the appellant was already a director of Megamerge and a signatory for its bank account.

Held, dismissing the appeal with costs of RM2,000 and affirming the decision of the High Court:

(1) As the appellant was a director and general manager of the respondent, it was clear a fiduciary relationship existed between the parties. On the totality of the evidence, the appellant had acted negligently and breached his fiduciary duties to the respondent (see paras 22 & 34).

(2) In the discharge of his duties as fiduciary, the appellant owed the respondent a duty of care to act in its best interests and not to place himself in a position where his duty and his interest conflicted. The respondent was entitled to his single-minded loyalty as fiduciary in his appointment as its nominee in Megamerge. The evidence showed the appellant became a director of Megamerge before the proposed joint venture with Yasunaga was brought to the respondent's board for approval. The minutes of the 4 March 2005 and 17 March 2005 meetings chaired by the appellant did not show that in both those meetings the appellant had appraised the respondent's management about his directorship in Megamerge (see paras 24–25).

(3) The evidence showed that before the JVA was signed the appellant had issued a cheque for RM500,000 to Megamerge without the board's approval. The appellant conceded in cross-examination that he decided to make that payment on his own without the board's approval. He had therefore acted negligently and had breached his duty of care to the respondent (see paras 26 & 28).

(4) The appellant's admission that despite being instructed by the respondent to recover the RM500,000 he did not take any action to recover it and neither did he seek any assistance or advice on the matter was conduct inconsistent with ss 12 and 13A of the Enactment which set-out his duties and responsibilities and specifically provided, inter alia, that an officer/servant of the respondent shall not cause detriment to the corporation (see paras 29–30).

(5) The respondent did not appoint anyone to replace the appellant on Megamerge's board after his retirement from the respondent. He remained as director of Megamerge for six months thereafter. Ordinarily no cheque from Megamerge would be honoured by the bank unless it carried the required two signatures. Thus the only reasonable and plausible explanation for the withdrawals from Megamerge's account was that the withdrawal cheques were signed by two signatories one of whom had to be the appellant. The withdrawals occurred despite the appellant knowing that the monies were paid to Megamerge without the respondent's authorisation and that the respondent had wanted him to take action to recover back the monies (see paras 32–33).

[Bahasa Malaysia summary

Sewaktu tempoh perayu sebagai pengurus am ('PA') merangkap pengarah kepada responden ('PIJ'), dia mencadangkan kepada lembaga pengarahnya ('lembaga') bahawa PIJ memasuki satu perjanjian usaha sama ('JV') dengan sebuah syarikat dikenali sebagai Yasunaga. Majoriti lembaga bersetuju dengan cadangan dan memberi kuasa kepada perayu untuk melaksanakannya. Apabila perjanjian JV ditandatangani bagi pihak PIJ oleh perayu, ia memperuntukkan, antara lain, bahawa satu syarikat dikenali sebagai Megamerge akan melaksanakan JV, bahawa perayu dan salah seorang daripada timbalan pengarah urusan akan mewakili PIJ di Lembaga Pengarah Megamerge dan bahawa perayu dan seorang yang bernama Wong Kim Keong ('Wong') akan menjadi penandatangan cek Megamerge. Pada waktu itu, perayu tidak mendedahkan kepada Lembaga PIJ bahawa Megamerge telah pun diperbadankan dua bulan sebelum perjanjian JV ditandatangani dan bahawa dia adalah seorang daripada pengarahnya. Berikutan permerbadanan itu, Lembaga Megamerge telah memberikan kuasa kepada perayu untuk menguruskan akaun banknya secara bersama dengan Wong. Pada tarikh perjanjian JV ditandatangani, perayu telah mengeluarkan cek sebanyak RM500,000 daripada PIJ bagi pihak Megamerge tanpa mendapatkan kelulusan daripada Lembaga PIJ. Apabila mendapati perkara ini, PIJ mengarahkan kesemua tindakan berkaitan usaha sama dihentikan sementara menunggu pelaksanaan usaha wajar dan perayu diarahkan untuk mendapatkan kembali RM500,000 dan membekukan akaun Megamerge. Dia gagal untuk menuruti arahan tersebut. Perayu kemudiannya bersara daripada perkhidmatannya dengan PIJ dan kerana dia tidak lagi boleh mewakili PIJ di Lembaga Megamerge, PIJ memaklumkan Megamerge untuk melucutkannya sebagai penandatangan akaun bank mereka. Perayu, walau bagaimanapun, hanya bersara daripada Lembaga Megamerge enam bulan selepas dia meninggalkan PIJ dan adalah dikatakan antara kedua-dua tarikh sejumlah RM270,000 telah dikeluarkan daripada akaun Megamerga dengan tiga ansuran. PIJ menyaman perayu untuk pengembalian semula RM500,000 yang mana telah dibayar kepada Megamerge atas alasan dia telah berlaku cuai dan telah melanggar kewajipan fidusiari yang ditanggung olehnya kepada PIJ

apabila dia seorang pengarah am. PIJ mendakwa pengeluaran daripada akaun Megamerge hanya akan boleh berlaku jika perayu telah menandatangani bersama cek-cek itu. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi yang berpihak kepada PIJ. Mahkamah mendapati pembelaan perayu adalah penafian kosong semata-mata; bahawa dia telah bertindak melulu tanpa memperdulikan kepentingan PIJ apabila dia mengeluarkan cek RM500,000 kepada Megamerge sebelum perjanjian JV ditandatangani dan juga menandatangai perjanjian JV tanpa mendapatkan kelulusan kesemua Lembaga PIJ. Mahkamah juga mendapati perayu telah melanggar s 8 Enakmen Perbadanan Islam Negeri Johor 1 Tahun 1976 ('Enakmen'), yang mana di bawahnya PIJ telah ditubuhkan, dan juga s 132 Akta Syarikat 1965 kerana sebelum perjanjian JV ditandatangani perayu telah menjadi pengarah Megamerge dan penandatangan untuk akaun bank mereka.

Diputuskan, menolak rayuan dengan kos sebanyak RM2,000 dan mengesahkan keputusan Mahkamah Tinggi:

(1) Memandangkan perayu adalah pengarah dan pengurus am responden, ia adalah nyata hubungan fidusiari yang wujud antara kedua-dua pihak. Atas keseluruhan keterangan, perayu telah bertindak dengan cuai dan melanggar kewajipan fidusiarinya terhadap responden (lihat perenggan 22 & 34).

(2) Dalam melepaskan kewajipannya sebagai fidusiari, perayu mempunyai kewajipan berjaga-jaga terhadap responden untuk bertindak dalam kepentingan terbaik dan tidak meletakkan dirinya di kedudukan di mana kewajipannya dan kepentingannya bercanggah. Responden berhak terhadap kesetiaan yang tidak berbelah bahagi oleh perayu sebagai fidusiari dalam pelantikannya sebagai penama dalam Megamerge. Keterangan menunjukkan perayu menjadi pengarah Megamerge sebelum usaha sama yang dicadangkan dengan Yasunaga dibawa kepada lembaga responden untuk kelulusan. Minit pada 4 Mac 2005 dan 17 Mac 2005 dipengerusikan oleh perayu tidak menunjukkan bahawa dalam kedua-dua mesyuarat perayu telah menilai pengurusan responden akan 'directorship' perayu dalam Megamerge (lihat perenggan 24–25).

(3) Keterangan menunjukkan sebelum perjanjian usaha sama ditandatangani perayu telah mengeluarkan cek sebanyak RM500,000 kepada Megamerge tanpa kelulusan lembaga. Perayu mengakui dalam pemeriksaan balas bahawa dia memutuskan untuk membuat bayaran sendiri tanpa kelulusan lembaga. Dia oleh itu telah bertindak cuai dan telah melanggar kewajipan berjaga-jaganya terhadap responden (lihat perenggan 26 & 28)).

(4) Pengakuan perayu bahawa meskipun diarahkan oleh responden untuk mendapatkan kembali RM500,000 dia tidak mengambil apa-apa tindakan untuk mendapatkan kembali dan dia juga tidak meminta

apa-apa bantuan atau nasihat untuk perkara tersebut, adalah tindakan tidak konsisten dengan ss 12 dan 13A Enakmen yang mana menyatakan kewajipannya dan tanggungjawab dan secara spesifik memperuntukkan, antara lain, bahawa seorang pegawai/kakitangan responden tidak akan menyebabkan kerugian kepada perbadanan (lihat perenggan 29–30).

(5) Perayu tidak melantik sesiapa untuk menggantikannya di Lembaga Megamerge selepas bersara daripada responden. Dia tetap menjadi pengarah Megamerge selama enam bulan selepas itu. Kebiasaannya tiada cek daripada Megamerge akan diluluskan oleh bank melainkan ia membawa dua tandatangan yang diperlukan. Oleh itu satu-satunya penjelasan munasabah dan wajar untuk pengeluaran daripada akaun Megamerge adalah bahawa cek telah ditandatangani oleh dua penandatangan satu daripadanya semestinya adalah pemohon. Pengeluaran berlaku meskipun perayu mengetahui bahawa wang dibayar kepada Megamerge tanpa pengesahan responden dan bahawa responden mahu perayu untuk mengambil tindakan mendapatkan semula wang tersebut (lihat perenggan 32–33).]

Notes

For cases on fiduciary duties, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 269–310.

Cases referred to

Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)

The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469; [2008] 3 CLJ 221, FC (refd)

Legislation referred to

Companies Act 1965 s 132
Johore Islamic Corporation Enactment 1 of 1976 ss 4, 8, 12, 13A

Appeal from: Civil Suit No MT1-22–520 of 2009 (High Court, Johor Bahru)

Ibrahim Hashim (Hassan Ibrahim with him) (Hassan Ibrahim & Co) for the appellant.
Rosli Kamarudin (Rosli Kamarudin & Co) for the respondent.

Aziah Ali JCA (delivering judgment of the court):

[1] The respondent (the plaintiff in the court below) is a body corporate established under the Johore Islamic Corporation Enactment 1 of 1976 ('the Enactment'). The appellant (the defendant in the court below) was an officer in

the administrative service of the State of Johore who was seconded to the respondent to be a director and the general manager of the respondent. The appellant served the respondent as its general manager from 1 January 2003 until his resignation on 22 August 2005. On 23 August 2005 the defendant went on mandatory retirement.

[2] The respondent's claim against the appellant is premised on breach of fiduciary duty and negligence. It is the respondent's case that due to such breach and negligence, it has suffered losses. Therefore the respondent claims against the appellant as follows:

(a) RM500,000 as special damages;

(b) interests; and

(c) costs of RM10,000.

[3] The learned judge of the High Court decided in favour of the respondent and allowed the respondent's claim as prayed, hence this appeal.

[4] We have considered the submissions made by both parties and the record of appeal. We find no merit in the appeal. Consequently we dismissed the appeal with costs for the reasons we give below. In this judgment parties will be referred to as they were in the court below.

BACKGROUND FACTS

[5] The facts as found from the appeal record show that the defendant had circulated to the plaintiff's board of directors ('the board') a paper proposing a joint venture between the plaintiff and a company known as Yasunaga Industries Sdn Bhd ('Yasunaga') to manufacture a product known as 'Photo Squeenzer, DVD-R, CD-R' and other related products (exh P18). According to the plaintiff's deputy general manager II, Hjh Samiah bt Hj Abdul Rahim ('PW1'), it was the defendant who had promoted Yasunaga to the plaintiff. This was confirmed by the defendant in his testimony in cross-examination as follows:

Q: Boleh beritahu pegawai dalam PIJ yang buka pintu untuk bawa masuk Yasunaga?

A: Saya atas nasihat peguam.

[6] On 5 February 2005, six out of the eight members of the plaintiff's board had agreed to the proposal and that the defendant, as the plaintiff's general manager, be authorised to conduct negotiations with Yasunaga and to sign the joint venture agreement. At a meeting on 7 February 2005 chaired by the Chairman of the Committee for International Trade and Industry, Energy,

Water and Communication, Johore, which was also attended by the defendant, representatives of Yasunaga briefed the attendees on the product which they proposed to manufacture in a joint venture with the plaintiff (exh P17).

[7] Yasunaga was introduced to the plaintiff's management on 4 March 2005 at a meeting chaired by the defendant where the plaintiff's management was briefed on the proposed joint venture (exh P16). Another meeting chaired by the defendant was held on 17 March 2005 to discuss the draft joint venture agreement (exh P15).

[8] On 21 March 2005 the defendant, in his capacity as the plaintiff's general manager, signed the joint venture agreement ('the JVA'). In the JVA (exh P2), it is stated amongst others that:

(a) the parties propose that Megamerge be used as the joint venture vehicle;

(b) the plaintiff shall hold 30% shares and Yasunaga shall hold 70% shares in Megamerge;

(c) the defendant and PW1 shall be the plaintiff's representatives in the Board of Directors of Megamerge and that both shall be appointed as directors of Megamerge;

(d) at all times while the plaintiff remains a shareholder of Megamerge, both the defendant and PW1 shall be deemed to have been appointed as directors of Megamerge at the request of the plaintiff; and

(e) the defendant and one Wong Kim Keong shall be the signatories of cheques for Megamerge's bank account.

[9] The evidence showed that Megamerge, the joint venture vehicle, was incorporated on 27 January 2005 (exh P49). On 4 March 2005 the defendant and two others by the name of Wong Xin Yin and Leung Pui Lam were appointed directors of Megamerge (exhs P45 and P48). On the same date, the original/first directors of Megamerge resigned from its board (exh P47). On the same date too the three new directors of Megamerge passed a resolution giving authority to the defendant and one Wong Kim Keong to operate the account of Megamerge at Bank Muamalat (M) Bhd at Johor Bahru (exh P46). Whilst the defendant had been appointed as a director of Megamerge on 4 March 2005 PW1, who was also the plaintiff's representative in Megamerge together with the defendant, was appointed to the Board of Megamerge on 21 March 2005 ie the date the JVA was signed (exh P45).

[10] On the same date of signing of the JVA, the defendant had signed a cheque for RM500,000 in favour of Megamerge which was deposited into the account of Megamerge at Bank Muamalat as the plaintiff's initial investment. On 29 March 2005 Megamerge issued a cheque for RM200,000 as payment of

deposit to a contractor for renovation works to be carried out on a factory (see exh P13 item 4.1.13(iii) at p 355 of the appeal record). The cheque was cleared for payment the same day. The balance remaining in the account of Megamerge on 31 March 2005 was RM300,113.05 (exh P36 at p 398 of the appeal record).

[11] On 30 March 2005 at a meeting between the Menteri Besar of Johore (who is the chairman of the plaintiff by virtue of s 4 of the Enactment), the plaintiff's board and the defendant, a decision was made to stop all actions relating to the joint venture pending a due diligence being carried out (exh P13 item 4.1.8 at p 353). The defendant was directed to recover the RM500,000 and to freeze the account of Megamerge (exh P13 item 4.1.13 at p 355). The defendant acknowledged that he was directed to recover the RM500,000. He said that he had instructed one of his staff by the name of 'Fara' to take action to freeze the account. However he did not take any action to recover the RM500,000.

[12] On 22 August 2005 the defendant resigned as the plaintiff's general manager. With his resignation, the defendant automatically ceased to be a director of the plaintiff (exh P9 item 1.4 at p 322 of the appeal record). According to PW1, the plaintiff did not appoint anybody to replace the defendant in Megamerge.

[13] On 27 October 2005 the plaintiff, through PW1, notified the company secretary of Megamerge about the defendant's mandatory retirement and that he was no longer a director of Megamerge. The plaintiff instructed the company secretary to take immediate action to remove the defendant's name as one of the signatories in Megamerge (exh P40). Approximately six months after his mandatory retirement, on 21 February 2006 the defendant resigned from the Board of Directors of Megamerge (exh P38).

[14] The plaintiff adduced evidence to show that between the date of the defendant's resignation as the plaintiff's general manager and the date of his resignation as a Director of Megamerge, three withdrawals amounting to RM270,000 were made by Megamerge from its account at Bank Muamalat as follows (exh P36 at pp 403–404 of the appeal record):

(a) RM35,000 on 12 November 2005;

(b) RM35,000 on 9 December 2005; and

(c) RM200,000 on 12 December 2005.

[15] The plaintiff's claim against the defendant can be summarised as follows:

(a) that the defendant being the plaintiff's general manager owes a fiduciary duty towards the plaintiff;

(b) that the payment of RM500,000 was made by the defendant without first obtaining the approval of the plaintiff's board;

(c) that the defendant took no steps to recover the RM500,000 despite being directed to do so; and

(d) that withdrawals made from the account of Megamerge after the defendant's date of resignation as the plaintiff's general manager could only have happened if the defendant had signed the cheques since he was one of the co-signatories.

[16] The defendant denied all the allegations made against him. It was the stand of the defendant that all actions taken by him were authorised by the plaintiff's board and it was the plaintiff's board which owes a fiduciary duty towards the plaintiff. He denied any knowledge of the withdrawals made in 2005 and denied that he had signed any cheque after his resignation as the plaintiff's general manager.

DECISION OF THE HIGH COURT

[17] The learned judge allowed the plaintiff's claim essentially for the following reasons:

(a) the learned judge found the defence is a bare denial because:

(i) contrary to the defendant's defence that he did not receive any instruction to recover the RM500,000, the learned judge found that such instruction was given on 30 March 2005 followed by the letter dated 1 April 2005 issued by the Johore State Secretary (exh P14);

(ii) the same instruction was given again at the meeting of the plaintiff's board on 18 April 2005 which the defendant attended; and

(iii) the learned judge rejected the defendant's contention that he had no knowledge of the withdrawals from Megamerge because during the relevant period, the defendant was still a director of Megamerge until his resignation on 21 February 2006,

(b) the defendant was in breach of s 8 of the Enactment and s 132 of the Companies Act 1965 because before the JVA was signed, he had had dealings with Megamerge in which he was already a director and was one of the signatories for the bank account of Megamerge; and

(c) the defendant had acted recklessly (*tidak cermat*) and without regard to

the plaintiff's interest because he had signed the JVA without first getting the approval of the full board and he had issued the cheque for RM500,000 before the JVA was signed.

THE APPEAL

[18] The submissions made before us show that the primary issue for determination is whether there was a fiduciary relationship between the plaintiff and the defendant, and if there was, whether the defendant has breached his duty of care owed to the plaintiff as its fiduciary.

[19] Learned counsel for the defendant, Encik Ibrahim Hashim contended that the defendant owed a duty not to the plaintiff but to Megamerge in which he was a nominee director. Learned counsel for the plaintiff on the other hand contended that, being the general manager of the plaintiff and the plaintiff's nominee in Megamerge, the defendant owed a fiduciary duty to the plaintiff to protect the plaintiff's interest in Megamerge, in which the plaintiff had 30% shareholding. It was contended that the defendant had acted negligently in breach of his fiduciary duty.

[20] The issue of whether the defendant is in a position of a fiduciary to the plaintiff has to be resolved primarily with reference to the nature of the defendant's relationship with the plaintiff.

[21] We refer to the case of *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73, wherein the Federal Court referred to *Snell's Equity* (32nd Ed), (2010) Thomson Reuters. At pp 172–178, the learned author stated that the accepted categories in which the courts presume the existence of a fiduciary relationship are as follows:

(a) director vis a vis their companies;

(b) solicitor-client relationships;

(c) agent-principal relationship; and

(d) partnerships.

[22] It is not disputed that the defendant was a director and general manager of the plaintiff. Following the abovementioned authority, it is clear that there existed a fiduciary relationship between the plaintiff and the defendant.

[23] The obligation of a fiduciary is the obligation of loyalty and fidelity. The nature of the fiduciary obligation is, amongst others, to act in good faith based on a relationship of trust and confidence. In the case of *The Board of Trustees of*

the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469; [2008] 3 CLJ 221, the Federal Court in its judgment at pp 488–489 (MLJ); at p 244 (CLJ) states as follows:

> In law the position of the fiduciary and his obligation have been succinctly stated by Millet LJ in the English case of *Bristol and West Building Society v Mathew* [1988] Ch 1 to be as follows:
>
> > A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.
> >
> > The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere competence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

[24] It is thus implicit that in the discharge of his duties as a fiduciary, the defendant owed a duty of care to the plaintiff to act in the best interest of the plaintiff. The plaintiff had appointed him as its nominee in Megamerge. The plaintiff being the defendant's principal was entitled to the single-minded loyalty of the defendant, its fiduciary. Megamerge was not the defendant's principal. We therefore disagree with learned counsel for the defendant that the defendant owed a fiduciary duty to Megamerge and not to the plaintiff.

[25] The defendant being a fiduciary to the plaintiff must not place himself in a position where his duty and his interest may conflict. The evidence shows that the defendant became a director of Megamerge before the proposed joint venture with Yasunaga was brought to the plaintiff's board for approval. A perusal of the minutes of the meetings held on 4 March 2005 and on 17 March 2005 chaired by the defendant does not indicate that in both these meetings, the defendant had appraised the plaintiff's management about his directorship in Megamerge.

[26] The defendant agreed with learned counsel for the plaintiff that as the plaintiff's general manager, he had authority to sign cheques not exceeding RM500,000. There is in evidence that before the JVA was signed, the defendant had issued a cheque in the sum of RM500,000 to Megamerge

without the approval of the board ('the first cheque'). The defendant in his testimony conceded that he had issued the first cheque without the approval of the board but gave the explanation that he was advised by his lawyer that the payment, though irregular, could be made. Fortunately for the plaintiff, its finance manager Farahely bt Adnan ('SP3') sought the advice of the state legal adviser. In her testimony she explained that she did so because the cheque was issued before the JVA was signed and without the approval of the board. According to SP3, the state legal adviser then instructed her to stop payment. The board agreed and the chairman was informed. SP3 then prepared a memorandum dated 22 March 2005 to the bank to stop payment (exh P53).

[27] The circumstances surrounding the first cheque are relevant to the extent that it indicate that the defendant had placed himself in a position of conflict between his duty to the plaintiff and his interest in Megamerge. His conduct in issuing the first cheque to Megamerge without the approval of the board showed that the defendant had not acted in the best interest of the plaintiff.

[28] The defendant agreed with learned counsel for the plaintiff that there was no urgency to sign the JVA but Megamerge had wanted the JVA to be signed quickly. He agreed that under the JVA, there was no requirement to pay an initial investment and that there was no time period specified for payment of the RM500,000. Despite his defence that the payment of RM500,000 (the subject matter of the plaintiff's claim) was authorised by the plaintiff, in cross-examination the defendant had admitted that he himself had decided to make the said payment (p 157 of the appeal record). Thus by his own admission it is clear that the payment of RM500,000 to Megamerge was made without any authorisation from the plaintiff's board. The defendant has therefore acted negligently and had breached his duty of care owed to the plaintiff.

[29] The defendant had also admitted that despite the instructions given by the plaintiff to recover the monies, he had only given instructions to 'Fara' to freeze the bank account of Megamerge. He did not give any instructions nor take any action to recover the monies paid out. Neither did he seek any assistance or advice on this matter.

[30] The Enactment contains specific provisions regarding the defendant's duties and responsibilities as the plaintiff's general manager and as its officer. Section 12 of the Enactment states, amongst others, that as general manager he was bound to carry out the decisions of the plaintiff and the direction of the plaintiff's chairman. The defendant's lack of action and disregard for the plaintiff's instructions to recover the monies, and his failure to seek assistance or advice on this matter although he had ample to do so, are inconsistent with

s 12 of the Enactment and also s 13A (inserted vide Enactment No 11 of 1993) which specifically states, inter alia, that an officer or servant of the plaintiff shall not cause detriment to the plaintiff.

[31] With respect to the withdrawals made by Megamerge after the defendant's resignation as the plaintiff's general manager, the defendant merely denied knowledge of these withdrawals although he agreed that he was one of the two co-signatories of cheques issued by Megamerge.

[32] It is pertinent to note that, although on 22 August 2005 the defendant had ceased to be the general manager and director of the plaintiff, and had gone on mandatory retirement on 23 August 2005, he remained as a director of Megamerge until 21 February 2006 when he resigned from the board of Megamerge.

[33] We take note that ordinarily no cheque from Megamerge would be honoured by the bank unless the cheque carried the required two signatures. PW1 had testified that the plaintiff did not appoint any replacement for the defendant in Megamerge. Thus the only reasonable and plausible explanation for the successful withdrawals made by Megamerge was that the cheques were signed by the two signatories, one of whom would have to be the defendant. These withdrawals occurred despite the defendant knowing that the monies were paid out to Megamerge without the plaintiff's authorisation and that the plaintiff had wanted him to take action for the monies to be returned.

[34] On the totality of the evidence we agree with the plaintiff that the defendant had acted negligently and had breached his fiduciary duties to the plaintiff. Therefore this action is properly instituted against the defendant.

[35] For the reasons stated above, we find no merit in the defendant's appeal. The appeal is accordingly dismissed with costs of RM2,000 and the deposit was ordered to be refunded. We affirmed the order made by the High Court.

Appeal dismissed with costs of RM2,000 and decision of the High Court affirmed.

Reported by Ashok Kumar